United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

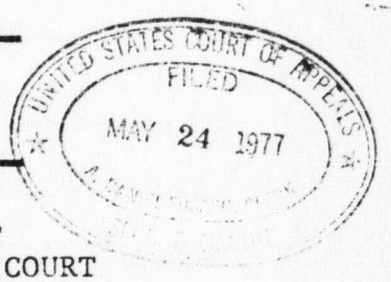
77-1083

To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRUCIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, -against- FRANK JOSEPH FUENTES and CARMELLO SANSONE, Defendants-Appellants.	Docket No. 77-1083

BRIEF FOR APPELLANT
FRANK JOSEPH FUENTES



ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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CONTENTS

Page

Table of Cases Cited ii

Questions Presented 1

Statement Pursuant to Rule 28(a)(3)

Preliminary Statement 2

Statement of Facts 2

A. The Informer 3

B. Events as Described by the Agents, and the Tapes and Transcripts 4

C. The Absence of Hugo 12

D. The Charge and Verdict 14

ARGUMENT

I IT WAS ERROR TO ADMIT THE TAPES OF MAY 27 AND JUNE 2 AND THE TRANSCRIPT OF JUNE 1 BECAUSE THERE WAS NO PROOF OF THE ACCURACY OR RELIABILITY OF THE TAPES 15

II THE INTRODUCTION OF THE JUNE 1 TAPE THROUGH THE TRANSCRIPT VIOLATED APPELLANT FUENTES' RIGHT TO CONFRONTATION 23

III IT WAS REVERSIBLE ERROR FOR THE COURT TO FAIL TO CHARGE THE JURY ON EVALUATING THE VOLUNTARINESS OF APPELLANT FUENTES' STATEMENT 26

Conclusion 28

TABLE OF CASES

McKeenan v. Commercial Credit Equipment Corp., 320 F.Supp. 938 (D.Neb. 1970) 17

Monroe v. United States, 234 F.2d 49 (D.C. Cir.), cert. denied, 352 U.S. 873 (1956) 16

United States v. Barry, 518 F.2d 342 (2d Cir. 1975) 26

United States v. Bonanno, 487 F.2d 654 (2d Cir. 1973) 17

United States v. Knohl, 379 F.2d 426 (2d Cir.), cert. denied, 389 U.S. 973 (1967) 17

United States v. Lucchetti, 533 F.2d 76 (2d Cir. 1976) ... 26

United States v. McKeever, 271 F.2d 669 (2d Cir. 1959) 16, 24

United States v. McKeever, 169 F.Supp. 426 (S.D.N.Y. 1958) 16, 17

United States v. McMillan, 508 F.2d 101 (8th Cir. 1974), cert. denied, 421 U.S. 916 (1975) 16, 17

United States v. Osser, 483 F.2d 727 (3d Cir.), cert. denied, 414 U.S. 1028 (1973) 18

United States v. White, 401 U.S. 745 (1971) 18

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, -against- FRANK JOSEPH FUENTES and CARMELLO SANSONE, Defendants-Appellants.	Docket No. 77-1083

BRIEF FOR APPELLANT FRANK JOSEPH FUENTES

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether it was error to admit the tapes of May 27 and June 2 and the transcript of the tape of June 1 because there was no proof of the accuracy or reliability of the tapes.

2. Whether the introduction of the June 1 tape through the transcript violated appellant Fuentes' right to confrontation.

3. Whether it was reversible error for the court to fail to charge the jury on evaluating the voluntariness of appellant Fuentes' statement.

STATEMENT PURSUANT TO RULE 28(a)(3)

PRELIMINARY STATEMENT

This appeal is from a judgment of the United States District Court for the Southern District of New York (The Honorable Morris E. Lasker) rendered on January 17, 1977, after a jury trial, convicting appellant Frank Joseph Fuentes of conspiracy to distribute narcotics (21 U.S.C. §§812, 841) and sentencing him to seven years' imprisonment with a six-year term of special parole.

The Legal Aid Society, Federal Defender Services Unit, was assigned as counsel on appeal pursuant to the Criminal Justice Act when trial counsel was relieved.

STATEMENT OF FACTS

Appellant Frank Joseph Fuentes and co-defendant Carmello Sansone (also called "Michel") were indicted* for conspiracy to distribute cocaine and for a sale of cocaine on June 4, 1976, to an undercover agent. The undercover agent for the Government, William Schnakenberg, and several surveillance agents testified to events occurring between May 27, 1976, and August 18, 1976, when appellant Fuentes and Sansone were separately arrested. The agents' testimony related to May 27

*The indictment is "B" to the separate appendix to the brief of appellant Fuentes.

and 28, and June 1, 2, 3, 4, 11, 15, and 18. There was no testimony concerning appellant Fuentes after June 1, 1976.

In addition to the testimony of the agents, the Government introduced tapes and transcripts of conversations between appellant Fuentes, co-defendant Sansone, and a Government informer named Hugo or of just Hugo and Sansone. The tapes were made on two types of machines: NAGRAs and Kels. A NAGRA can be turned on or off by the person wearing it (37, 180, 323*) and it records; a Kel is a transmitter allowing a receiver to pick up the voices (351). A Kel transmits, but does not record (77). When a Kel is used, the recording is done at the receiving end. The tapes were in English, French, Italian, and Spanish, and the transcripts were translated.

A. The Informer

In exchange for Government assistance to bring his two sons to the United States from Italy to avoid Italian military service (619-620), Hugo became a Government informer. Hugo had a prior record (174) and was paid $500 to $600 per month during the course of his work. The agents first had contact with Hugo around May 10, 1976 (72, 515). He was assigned to work for Agent Schnakenberg (73).

Hugo participated in the events between May 27 and June 18, 1976, and appeared briefly thereafter to hear the tapes

*Numerals in parentheses refer to pages of the transcript of the trial.

(506). However, he never completed listening to them, and he was not in contact with the prosecutor after November 5, 1976 (622). The Assistant U.S. Attorney, knowing that Hugo had not been in contact with the Government, and stating that efforts had been made, although not describing them, to get Hugo's presence (456), put Hugo's name on a witness list given to defense counsel four days before trial (455). Counsel claimed that they relied on the expectation that Hugo would be present as a Government witness (455, 600).

B. Events as Described by the Agents, and the Tapes and Transcripts

On May 27, 1976, at 2:50 p.m. (34), Hugo was fitted with a NAGRA recording device (35, 308) and instructed to go ahead with the narcotics negotiations with Sansone (36). Hugo was dropped off around 45th Street and Ninth Avenue (36). Hugo met with Sansone and appellant (309-310, 439), and talked (310, 335). Later, Hugo and Sansone were seen on Ninth Avenue (310, 336). Another agent saw Hugo meet Sansone, but did not see appellant (363-367).

Two hours later Hugo met with DEA agents who took the tape out of the NAGRA (38) and put it into a sealed envelope (39). The tape (Exhibit 2) was listened to by a defense and a Government interpreter and DEA Agent Schnakenberg on November 9, 1976 (40). Agent Schnakenberg testified that he had heard Sansone's voice while speaking with him (45) and that he recognized Hugo's and Sansone's voices on the tape (44).

The tape was played for the jurors (592-593) and they followed with transcripts (591) approved by both parties (573). The tape took 45 minutes to play (591), although the transcript was only 20 pages long. The conversation was between Sansone and Hugo, in which Hugo did most of the talking. The tape is largely unintelligible, with gaps.

At various fragmented parts of the transcript, Hugo spoke of a sale of 8 1/2 kilos. Hugo said there was nothing to worry about and that he would talk about price later. Both Sansone and Hugo talked about knowing people. Hugo stated that he would like half a kilo first, then "we shall do five." Sansone, in a partially unintelligible sentence, says they have to cut it. Later, the two discuss trusting the people they will deal with.

On May 28, 1976, at 6:00 p.m., Agent Schakenberg met Hugo at a bar. When Hugo left, he met appellant and Sansone (311) and they talked for about 20 minutes (312, 337). Appellant and Hugo were seen to extend their arms to each other (312) so that their hands almost touched (313). Hugo returned to the bar some 20 minutes after he had left it with a matchbook which contained cocaine (52; see 44). Schnakenberg told Hugo to tell Sansone and appellant he was ready to do a deal of half a kilo for $20,000 (53). Hugo went in and out of the bar several times (54). He met with Sansone on the street (442). During that period, Agent Finnerty handed Schnakenberg $20,000 (54, 442).

After awhile, Schnakenberg told Hugo to advise appellant

and Sansone that the deal was off if it didn't go Schnakenberg's way (54) -- that is, Schnakenberg wanted to pay for the cocaine directly, rather than making his payment through Hugo (55). Hugo took the money to show it to Sansone (56) and returned it to Schnakenberg (54).

Appellant was observed briefly speaking to Sansone (272) at 9:00 p.m. on 45th Street between Eighth and Ninth Avenues (264-265).

On June 1, 1976, at 4:00 p.m., a Kel transmitter and a NAGRA recorder were placed in a Government vehicle (77, 606). Hugo was aware that the equipment had been installed (606). One of the surveillance agents, Pavlick, was monitoring the Kel transmitter in another Government car (444), but was unable to hear the entire conversation (445); indeed, he sometimes was unable to hear for 10 to 15 minutes (445).

The various agents testified that they saw Sansone in the car with Hugo (267) and appellant (337, 443). Hugo was carrying $20,000 with which to purchase cocaine. Appellant was also observed in the vicinity of the car, entering a building, and then again in the car with Sansone and Hugo (267, 338, 369). Sansone and appellant later left the car (267-268, 329), separated, and met again. At that point, Sansone went over to a taxicab, which was really a Government surveillance point, and cursed the driver (340).

When Hugo returned to the DEA offices, the NAGRA and Kel tapes were removed from the car (79). After much conflicting

testimony (contrast 487, 492 with 551-552; see also 155-158), the Government finally admitted by stipulation that the NAGRA recorder had malfunctioned (653-655; 682) and that the Kel tape was the one (Exhibit 3; Tape F) which was listened to, translated (82-83), and transcribed (Exhibit 5-a).

Agents Pavlick and Schnakenberg testified that they listened to the June 1 tape in November 1976 and that they recognized appellant's voice because they had spoken to him when he was arrested on August 18 (83-84, 457).* Pavlick also said he knew the voice must be appellant's since there were three voices on the tape and appellant was the third person in the car (458).

The tape was not played, but the jurors were given the transcript to read. The parties stipulated that the transcript was accurate and that there were three parties to the conversation (697).

The tape showed that Hugo, Sansone, and appellant were in the car and that, after giving Hugo driving directions, appellant left the car. After appellant left, Hugo and Sansone discussed the car that was needed by them. Hugo said he wanted to deal with Sansone rather than with other people; Sansone said any person he presented to Hugo would be good. Then Hugo asked Sansone where appellant had gone, and answered his own question -- to get cocaine. After a time, appellant returned and said that they would have to wait until 10 o'clock; they agreed to meet at 9:30.

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*Pavlick also thought he heard appellant on the June 2 tape, but he was mistaken (478).

On June 2, 1976, a Kel transmitter and a NAGRA recorder were placed in a Government Cadillac. Hugo was told that the equipment was in the arm rest, which he was told not to use (611). Hugo was again given $20,000 (86, 611).

Sansone got into Hugo's car. He then left the car to make a telephone call (459), and then returned to the car (459). Sansone and Hugo spent some hours together (459).

Later that day the tapes were removed. The NAGRA tape was introduced as Exhibit 6 (Tape G) (87, 672). Schnakenberg recognized the voices of Hugo and Sansone (89). Exhibit 6-a was a transcription of the tape made with a Government interpreter (89), compared with the tape on November 6, 1976 (90).

The tape reflected a conversation between Sansone and Hugo* as they rode about together. Hugo expressed concern about being followed. Hugo inquired whether Sansone knew Frank very well, but Sansone did not respond. The two arranged the signal to be given in the event they were followed. They discussed making more money in Canada. Hugo was angry because Frank did not tell him about the cab. Then Hugo stopped to call Bill (Schnakenberg).

On June 3, 1976, new tapes were placed in the NAGRA, and the NAGRA recorder and Kel transmitter were placed in the Government car (95, 613). Schnakenberg told Hugo this time

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*The transcript given to the jurors contained only the portions of the tape played. Later, the defense introduced an expanded transcript (719).

he would not get the $20,000 until Sansone said he could get the cocaine (95).

Subsequently, Hugo called Schnakenberg, and the latter took $20,000 and met with Hugo and Sansone (97).

Hugo introduced Schnakenberg to Sansone as Bill, and all three got into the Cadillac to talk (99).

Later, the tapes were removed from the NAGRA (Exhibit 9) and the Kel tapes were removed. On November 8, 1976, Schnakenberg listened to the NAGRA tape (Exhibit 9) with a Government interpreter (102). Exhibit 9-a (or I) (634) was a transcript of the English portion of the conversation (103), that is, the conversation that occurred while Schnakenberg was in the car (104). The conversation before and after Schnakenberg got into the car was in Italian (105).

The tape was played (636-638) and the transcript used to follow it. On the tape were Sansone, Hugo, and Schnakenberg discussing the purchase of half a kilo and, if that was good, a much larger amount.

On June 4, 1976, Schnakenberg met Sansone and Hugo with $20,000 (113). The money was given to Hugo. Schnakenberg complained about the failure to deliver the cocaine and Sansone guaranteed delivery within the hour (114). Sansone and Hugo then left (114).

Hugo returned with a package containing cocaine (116) and $1,300 of the money that he had been given earlier (117).

On June 11, 1976, Schnakenberg met Sansone and complained

about the bad quality of the cocaine (123). Sansone promised a make-up package (123-124), although stating that Schnakenberg should have complained earlier (124). Schnakenberg rejected Sansone's offer to sell more drugs until he got the make-up package (125).

On June 15, 1976, Sansone and Schnakenberg again discussed the make-up package. Then Sansone offered to introduce Schnakenberg to French heroin dealers (133). Schnakenberg was immediately interested, but Sansone put him off until the cocaine deal was completed (134).

On June 16, 1976, Sansone told Schakenberg that he could not get the make-up package because the people were out of town, but he had a new connection and could get three kilos for $44,000 a kilo (134). Schnakenberg said he would think about it (134).

On June 17, 1976, Schnakenberg told Sansone that he would advise him the next day whether he was interested in the new supply of cocaine (135).

On June 18, 1976, Sansone supplied Schnakenberg with a sample of cocaine,* and the two agreed to meet later that day. Since the Government would supply no additional funds for a cocaine buy, at the subsequent meeting Schnakenberg told Sansone that there would be no deal because the cocaine was not

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*Sansone was observed by a surveillance agent to enter Schnakenberg's car, leave it, enter a building, and return to the car (341). This was the same building appellant Fuentes had entered on June 1 (343).

oure (136-138). Sansone, after making some telephone calls, insisted that the sample was pure and demanded its return (138, 342).

On August 18, 1976, appellant Fuentes was arrested (375) and gave a statement to the agents. During the trial, a hearing was held with respect to the agents' compliance with Miranda v. Arizona and the voluntariness of appellant's statements. Agents Fillmore, Burstein, and Pavlick testified. They testified that appellant had been given notice of his rights in the Government car after the arrest (375) and that appellant said he understood his rights (380). At the DEA office appellant was fingerprinted and photographed, and he gave a "202" statement (380). It was acknowledged that four of the agents tried to get appellant to cooperate with them and that they told him they had been investigating him (398-399; 402). Appellant said he would not cooperate (398).

After processing, appellant was taken to a lounge.

Appellant testified that he knew he did not have to make a statement, but that the questions were coming at him from every direction, so he made a statement (413-414). Judge Lasker found the statement voluntary.

At trial, Agent Pavlick testified that after the arrest appellant said he would not cooperate and had nothing to say (469). Pavlick admitted that, despite appellant's assertion of his rights, he kept talking to appellant (472). Pavlick testified that appellant revealed that he recognized two of

the agents from the street (470) and that he was on the roof of a building near the DEA office watching agents and their cars (469). Pavlick testified that he believed that appellant's statements were "gratuitously" made (472).

C. The Absence of Hugo

On numerous occasions during the course of the trial, counsel for appellant objected to the Government's failure to call Hugo as a witness (437, 455, 456, 599, 700). Counsel asserted that he was entitled to cross-examine Hugo with respect to hand motions, whispering, and other things that would not be reflected on the tapes of the conversations introduced into evidence (449). He also asserted that he would cross-examine on the ability of Hugo to manipulate the tape (550), especially his ability to turn off the NAGRA recorder, and to explain the gaps in the tape (454).*

*In his summation, the Assistant U.S. Attorney stated that counsel had stipulated to the accuracy of the transcripts (777) and to the accuracy of the tapes (783). The latter statement was incorrect, for defense counsel's assertion throughout was that the tape had been manipulated.

When defense counsel learned that the Government could not produce Hugo, he requested that the tapes be excluded (455, 510, 700) and that a mistrial be declared (456). Counsel explained that he relied on the inclusion by the Assistant U.S. Attorney of Hugo on the Government witness list. The list had been given to the defense prior to trial, and counsel believed that Hugo would be called as a Government witness and expected to cross-examine him (455-456).

The Assistant U.S. Attorney argued that since Hugo was not called to testify, his credibility was not in issue, and therefore there was no basis for a defense cross-examination of him (568). The prosecutor also asserted that Hugo's statements on the tapes were not hearsay (701), producing a similar conclusion as to cross-examination.

The court denied the defense motions (702),* after previously indicating the need for guidance from the appellate court on the question of the Government's failure to produce an informer (509).

At the close of the Government's case, Count II, the substantive count, was dismissed as against appellant Fuentes (705).

In his summation, the Assistant U.S. Attorney relied upon the tapes and the transcripts made from them to argue that the

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*The Government asserted, without describing them, that efforts had been made to have Hugo at trial (456), that his whereabouts were not known (507), that he had not been under arrest (508), and that the Government had no control over him (508).

Government had met its burden of proof. Seven times the Assistant U.S. Attorney referred to the tapes (770-777) of June 1, 2, and 3. He said the tapes were proof of the negotiations (770). He mentioned the portion of the tape of June 1 of the conversation between Sansone and Hugo when appellant Fuentes was not in the car (771). Then he said:

> Look closely at the language in that transcript because that is the type of evidence you've got to consider during your deliberations to determine whether or not there was a conspiracy in this case and an agreement where these two men were working together.
>
> (773).

As to the tape of June 2, the prosecutor quoted it as:

> Then the transcript goes on and Carmello Sansone says, "Frank was afraid to say anything because at that point he felt there might be somebody following him," which is precisely what happened on that night.
>
> (775).

D. The Charge* and Verdict

The judge gave no instruction on whether and how the jurors were to evaluate the voluntariness of appellant's post-arrest statement.

Following deliberations, the jury returned with a verdict of guilty against appellant Fuentes on the conspiracy charge.

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*The complete text of the court's charge to the jury is annexed as "C" to the separate appendix to the brief for appellant Fuentes.

ARGUMENT

Point I

IT WAS ERROR TO ADMIT THE TAPES OF MAY 27 AND JUNE 2 AND THE TRANSCRIPT OF THE TAPE OF JUNE 1 BECAUSE THERE WAS NO PROOF OF THE ACCURACY OR RELIABILITY OF THE TAPES.

During the trial, the Government introduced into evidence the tapes or the transcripts of four conversations -- May 27, June 1,* June 2, and June 3. The May 27 recording was a fragmented one, recorded on a NAGRA recorder, of a conversation between Hugo, the missing informer, and Sansone. The June 1 transcript, which the jury read, was made from a recording from a Kel transmitter. The conversation was overheard by Agent Pavlick on a Kel receiver in the car in which Pavlick was driving. However, Pavlick did not hear the entire conversation. He testified that he could not hear a lot of the talking, sometimes 10 to 15 minute periods of it. This conversation was the only one in which the tape reflected appellant Fuentes' involvement, and for a substantial time appellant Fuentes was not in the car.

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*For this date the parties agreed to have the jury read the transcript rather than listen to the tape.

The June 2 tape was from a NAGRA recorder, and the conversations involved only Hugo and Sansone. In the tape, Hugo attempted to get Sansone to mention Fuentes' name or participation.

The June 3 tape, also from a NAGRA recorder, involved Agent Schnakenberg and makes no mention of appellant Fuentes. Schnakenberg and Sansone discussed the transfer of 1/2 kilo and a larger amount later.

Defense counsel, while acknowledging that the transcripts of the tapes accurately reflected what was on the tapes, on numerous occasions challenged the accuracy of the tapes themselves. They argued that the tapes were inadmissible because the Government had not called Hugo as a witness to testify about the tapes, thereby also making him available for cross-examination about the tapes and the making of them. Defense counsel were correct in their position about the tapes and the resulting transcripts, and the judge's refusal to exclude the tapes or to strike them after they were introduced into evidence was error.

The requirement of establishing "foundation" to justify the admission of a tape into evidence to corroborate a witness' testimony is clearly established. United States v. McKeever, 169 F.Supp. 426, 430 (S.D.N.Y. 1958), cited approvingly in United States v. McKeever, 271 F.2d 669, 675 (2d Cir. 1959); Monroe v. United States, 234 F.2d 49 (D.C. Cir.), cert. denied, 352 U.S. 873 (1956); United States v. McMillan, 508 F.2d 101 (8th Cir. 1974), cert. denied, 421 U.S. 916 (1975); McKeeman

v. Commercial Credit Equipment Corp., 320 F.Supp. 938 (D.Neb. 1970). A fortiori, these requirements must apply when the tape is not used merely to corroborate testimony of witnesses, but, as is permitted, is admitted as independent evidence. United States v. McMillan, supra; United States v. Bonanno, 487 F.2d 654, 659-660 (2d Cir. 1973). The burden of proving the proper foundation for the admissibility of tapes is upon the Government, and it must establish the tapes' authenticity and reliability. United States v. Knohl, 379 F.2d 427, 440 (2d Cir.), cert. denied, 389 U.S. 973 (1967). Under McKeever, the Government must show, inter alia, that the operator of the machinery was capable of working it, that the recording made is authentic and correct, that there have been no changes, additions, or deletions, and that the recording is preserved. As the judge in McKeever stated:

> The reliability of the resulting recording must be established before the recording itself can be admitted. The "credibility" so to speak, of the recording itself, its accuracy and completeness, are left to the trial judge to determine as an initial or preliminary question of fact. The functional importance of foundation proof of accuracy and authenticity is highlighted by the obvious circumstances that the mechanical, physical recording cannot be cross-examined.
>
> United States v. McKeever, supra, 169 F.Supp. at 431 n.1.

As in McKeever, the critical factors of the tapes' accuracy and reliability were assumed to be necessary by the Supreme Court in discussing the admissibility of tapes in United

States v. White, 401 U.S. 745, 753 (1971); see also United States v. Osser, 483 F.2d 727 (3d Cir.), cert. denied, 414 U.S. 1028 (1973).

Here, no one could testify to the accuracy of the tapes of May 27, June 1, and June 2. Hugo, present at all three meetings, was not called by the Government to testify, either prior to trial or at trial. Indeed, the Government did not know where Hugo was after November 5, 1976.

The May 27 tape was made through a NAGRA recorder. The uncontradicted testimony showed that this machine could be turned on and off by the person wearing it and that Hugo was wearing one on May 27. The NAGRA tape of that day was largely inaudible and the transcript shows large gaps. Since the operator of the recording device was in a position to manipulate its functioning, and since the tape and resulting transcript demonstrate that it was possible that such manipulation took place, the factual basis for a challenge to the accuracy and reliability of the May 27 tape was clearly present.

However, the operator here -- who was the informer -- was not present to testify whether the tape accurately reflected the conversation, to his possible manipulation of the recording device, or to produce an explanation of how the gaps occurred. Furthermore, counsel was unable to cross-examine him on these questions.

Similarly, there was no proof of the accuracy of the June 1 tape, which was made from the Kel transmitter. Since the

June 1 NAGRA tape was agreed by all parties to be totally inaudible due to a malfunction of the equipment, the tape made with the Kel had to be used. However, the conversation transmitted by the Kel could not be testified to as being accurate because Agent Pavlick, listening on the Kel receiver, was unable to hear the conversation in its entirety, and indeed could not hear for 10 to 15 minutes at a time. Further, the tape recorded a conversation in Spanish and Italian, with only limited sections in English. Since there is no proof that Pavlick understood Spanish or Italian, he had no ability to testify to the accuracy of the tape recording of the conversation.

This June 1 tape was very important to appellant Fuentes, for it was the only tape in which he was asserted to be a party to the conversation.* The potential for the tape to mislead is highlighted by the fact that appellant Fuentes was not present during the conversation between Sansone and Hugo which involved discussion of kilos, prison terms, and money. This fact was not disclosed by the prosecutor, but by defense counsel, after carefully listening to the tapes. Thus, the tape on its face presented an ambiguous picture of what had occurred, and raises questions about the accuracy of other portions of the tape. It was precisely this type of question that the McKeever requirements are intended to bring out into the open.

The third tape -- that of June 2, 1976 -- was from a NAGRA

*Pavlick testified that he heard appellant's voice on the tape, but he had to acknowledge he was in error when he said he heard appellant's voice on the June 2 tape.

recorder placed in the Government car. The difficulties discerned and revealed by defense counsel earlier with respect to the June 1 NAGRA tape made testimony as to the accuracy of the June 2 tape very significant. Examination of Agent Pavlick and colloquy (641-653) with the Assistant U.S. Attorney finally established that the NAGRA installed in the Government car used on June 1 had for some reason malfunctioned and had not recorded.* Counsel argued that this may well have demonstrated that Hugo had intentionally damaged the equipment or turned it off (654). Counsel's position was that similar questions existed about the accuracy of the June 2 tape and about Hugo's conduct in operating the recorder.

Portions of the NAGRA tape of June 3 present identical problems of accuracy and reliability. Agent Schnakenberg participated in part of the conversation, so there was a witness available to testify about the accuracy of that portion of the discussion. However, there were other parts of the conversation that were conducted in Italian between Sansone and Hugo before Schnakenberg arrived and after his departure. In a single line, made after Schnakenberg left the car, Sansone said, "--- Frank is his boss I am with Michel." Since the sentence is incomplete and since it does not make sense that Sansone, who is also called "Michel," called himself by his own

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*There was great confusion on Pavlick's part as to which tape he had listened to, the Kel or the NAGRA. First, he stated positively that it was the NAGRA tape; then, when defense counsel had Pavlick examine the tape, Pavlick agreed that it was the Kel.

name, questions are raised as to the accuracy of the recording and again of whether Hugo was turning the NAGRA recorder on and off.

The impact of the tapes on the jury must have been substantial. Those that were played took a long time. The jury conscientiously followed the tapes by reading along in the transcripts. Indeed, a signal system was arranged between the defense interpreter, Mrs. Nawi, and the jurors (593, 635-636) which would enable the jurors to turn the page at the appropriate time even though the tapes were in a foreign language. Furthermore, the prosecutor referred to the tapes many times in his summation (770, 771, 772, 773, 775, 776, 777),* stating, "From June 1st to June 3rd one tape was made each day of the part of the negotiations on that day" (770), and later,

> Look closely at the language in that transcript because that is the type of evidence you've got to consider during your deliberations to determine whether or not there was a conspiracy in this case and an agreement where these two men were working together.
>
> (773).

The jurors requested the transcripts during deliberations (902).

The problems with the accuracy of the tapes became apparent to counsel during the course of the trial. First was the failure to call Hugo to testify after he had been listed as a

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*It must be noted that in his eagerness to use the tapes in support of his case, the prosecutor asserted that it was Sansone who used the word "cocaine" when talking about where Frank went in the tape of June 1 (706). It was not Sansone who said "cocaine," but Hugo.

Government witness; second was the discovery that the NAGRA tape of June 1 was inaudible; third was Pavlick's testimony that he could not hear all the June 1 conversation on the Kel receiver. As soon as counsel became aware of the Government's inability to meet its burden of proof with respect to the admissibility of the tapes, defense counsel requested that they be stricken. At one point a motion for mistrial was made. The motion to strike was proper, and under the circumstances, the failure to grant the motion was error requiring reversal.

Point II

THE INTRODUCTION OF THE JUNE 1 TAPE THROUGH THE TRANSCRIPT VIOLATED APPELLANT FUENTES' RIGHT TO CONFRONTATION.

The final two pages of the transcript of the tape of June 1, which transcript was used as a substitute for the playing of the tape to save time (686), were introduced into evidence. These pages show Hugo's statements to other agents after Sansone and appellant Fuentes had left him. They are a summary of the events that had transpired:

> Anyway they came back after 15 minutes. I don't know if you are near me or not. O.K. They left the car at 104th and Broadway. They told me that they weren't ready but before Frankie he left the car and he went over there on Riverside and then he came back up in fifteen or twenty minutes and he said that the people weren't ready because something and then I've got to meet them at 9:30. So Michel said O.K. So he says that he was going to take a bath. So Michel told him "Where do we see you" and he says "O.K., O.K. I will see, in the same place look, I don't know. So when we were at the corner, he says, "O.K. we go" and he says "Michel Michel will go" and took a left. Now I don't know if he went out and he know something because before they were impressed from a cab who was following us but not the cab the one w[h]ere you are but another cab. I guess it was a (inaudible) It seems to me. I guess he understands that something was going wrong.
>
> Transcript of tape of June 1 at 22-23.

These statements could obviously be considered by the

jurors as Hugo's statements of what occurred, and as such were considered for the truth of those statements. No instruction was given on how the jurors were to consider this portion of the transcript, but in any event it was counsel's position that the jurors could make no distinction between Hugo's possible play-acting and his asserted statements of fact. Indeed, this Court has previously stated that the analysis used by counsel here was correct. Thus, in United States v. McKeever, supra, where the defense sought to introduce the tape of a conversation between the defendant and a Government witness named Bill, this Court agreed with the district court's decision not to admit the tape:

> ... The recording, however, contained so many self-serving statements by the defendant McKeever that it is doubtful whether any instruction by the trial judge that the jury should not consider McKeever's taped statements as bearing on the truth or falsity of his defense would have been adequate to prevent such consideration. To have permitted the playing of the recording involved in this case would in effect have allowed a witness to give testimony without being sworn and without opportunity for his cross-examination. When, as here, the unsworn witness was the defendant himself, who at no time during the trial took the stand and whom the government was powerless to call as a hostile witness, we think it was a proper exercise of the trial judge's discretion to forbid the playing of the recording.
>
> United States v. McKeever, supra, 271 F.2d at 676.

The fact that Hugo's statements summarized the events did not make the error any less substantial. In cases in which a tape is admitted to corroborate a witness' testimony,

the witness is subject to cross-examination, and the tape must be accurate. Obviously, both relate to the same subject matter. But there is no diminution of the right to cross-examine the witness or of the Government's burden to establish the accuracy of the tapes (see cases cited supra at 16). Likewise, here the introduction of a tape, even if its accuracy were not challenged, should not deprive the defendant of the right to cross-examine a witness who is, in essence, testifying. Counsel was quite correct in asserting his right to confront Hugo, for Hugo spoke to the jurors directly about what had occurred.

Point III

IT WAS REVERSIBLE ERROR FOR THE COURT TO FAIL TO CHARGE THE JURY ON EVALUATING THE VOLUNTARINESS OF APPELLANT FUENTES' STATEMENT.

Raised in the district court was the issue of whether the statements given by appellant Fuentes were voluntary. The judge heard testimony on the issue and found that the statements were admissible. The statements were testified to by the agents. However, Judge Lasker did not tell the jurors that they were to determine whether the statements were voluntary, as is required under 18 U.S.C. §3501, and gave no instruction on the issue. The failure to charge the jury is plain error. United States v. Barry, 518 F.2d 342, 347 (2d Cir. 1975).

The issue was raised at trial by the examination and cross-examination of Agent Pavlick, who admitted that appellant stated that he did not wish to cooperate or make a statement and that Pavlick continued to talk to appellant. Finally appellant made a statement. Pavlick testified that he believed it was a freely given statement. However, this issue was one properly to be resolved by the jury and was raised by the evidence. See United States v. Lucchetti, 533 F.2d 76 (2d Cir. 1976).

On the facts of this case, that plain error was not harmless, and requires reversal. Proof of appellant's participation in the crime was not substantial. Indeed, the Government failed to prove his participation in the substantive offense, and it was dismissed. Further, the record shows that there was no

proof of appellant's association with Sansone after June 1, 1976. The evidence of appellant Fuentes' participating in the venture is minimal. His voice was not asserted to be on any tape except the one of June 1. Even on that tape he was not present during the bulk of the conversation between Hugo and Sansone. Further, the identification of Fuentes' voice by Pavlick was weak. Pavlick's identification was based on a comparison between the voice he heard on August 18 when he arrested appellant Fuentes and the voice, speaking in a foreign language, on a partially inaudible tape, which he heard early in November 1976. The jurors might have concluded that the testimony of the voice identification was too weak to be believed. The statements were important for linking appellant Fuentes to the crime, for although the testimony of the surveillance agents placed appellant with Sansone, there was no testimony on the substance of the conversations but for the tapes on which, as noted, Fuentes appeared only once.

On this record, the statements were important to giving otherwise equivocal evidence a significance which favored the Government. Accordingly, the failure to charge the jury that they must determine whether the statements were voluntary was error requiring reversal.

CONCLUSION

For the foregoing reasons, the judgment of the district court must be reversed and a new trial ordered.

Respectfully submitted,

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CERTIFICATE OF SERVICE

May 24, 1977

I certify that a copy of this final brief and [redacted] has been mailed to the United States Attorney for the Southern District of New York.

Phyllis Kaminsky